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Supreme Court of the United States

OCTOBER TERM, 1964

AMERICAN-HAWAIIAN STEAMSHIP COMPANY, AMERICAN UNION TRANSPORT, INC., SEATRAIN LINES, INC., THE PENNSYLVANIA RAILROAD COMPANY, ET AL., *Petitioners*,

v.

C. DOUGLAS DILLON, SECRETARY OF THE TREASURY, ET AL., *Respondents*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT SEA-LAND SERVICE, INC. IN OPPOSITION

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OPINION BELOW

The District Court wrote no opinion. The opinion of the Court of Appeals (Pet., pp. 1a-10a) is reported at 335 F. 2d 292.

QUESTION PRESENTED

Whether, in the absence of any statutory provision for judicial review, the action of the Commissioner of Customs in documenting two vessels for use in the coastwise trade as U.S.-owned and built is subject to challenge in court by railroads and steamship companies claiming to be injured by competition from the operator of the vessels.

STATEMENT

The Commissioner of Customs, who is the head of the Bureau of Customs, an agency of the Treasury Department, is charged with the responsibility of documenting ships flying the American flag. Act of July 5, 1884, § 2, 23 Stat. 118, as amended, 46 U.S.C. § 2. The substantive dispute in this case concerns the decision of the Commissioner to document two vessels now being operated by this respondent, Sea-Land Service, Inc. The documentation took the form of re-enrolling the two ships for use in the coastwise trade after they had been rebuilt to increase their capacity.[1]

Two of the petitioners, Seatrain Lines, Inc., and American-Hawaiian Steamship Co., protested to the Commissioner against any documentation of the two ships. (J.A. 13-17, 17-55). They founded their protests on the Act of July 5, 1960, 74 Stat. 321. Section 1 of that Act amended Section 27 of the Merchant Marine Act of 1920, 41 Stat. 999, as amended, 46 U.S.C. § 883. Section 27 prohibits the transportation of merchandise in the coastwise trade in vessels that have not been built or, if rebuilt, rebuilt in the United States and that are not owned by citizens of the United States. The 1960 amendment to Section 27 provides that to remain eligible for the coastwise trade a rebuilt ship must be rebuilt in its entirety, including the construction of any major components of the hull or super-

[1] Documentation is of two kinds, registry and enrollment. "The purpose of a register is to declare the nationality of a vessel engaged in trade with foreign nations, and to enable her to assert that nationality wherever found. The purpose of an enrolment is to evidence the national character of a vessel engaged in the coasting trade or home traffic, and to enable such vessel to procure a coasting license." The Mohawk, 3 Wall. 566, 571 (1866).

structure, in the United States. Before that the use of foreign-built components was permitted so long as the actual rebuilding took place within the United States. Section 4 of the 1960 amendatory statute was a savings clause. It provided that a vessel would not lose its coastwise privileges by reason of the amendment if it was rebuilt in the United States (even though with a foreign-built component) under a contract entered into before the effective date of the statute, which was July 5, 1960, and if the work of rebuilding was begun within 24 months of that date.

The two vessels in question were, without dispute, built in the United States. They were also rebuilt in the United States, using foreign-built midbodies to increase their size and carrying capacity. The question raised by Seatrain and American-Hawaiian in their representations to the Commissioner of Customs and other officials was whether the ships were nevertheless within the savings clause. Seatrain and American-Hawaiian urged that the rebuilding done in the United States was not done under a contract executed before July 5, 1960. The Commissioner received and considered extensive written data that were submitted on behalf of the protestants and also heard them orally. (See J.A. 56-60, 67, 101). The statutes he administers do not provide for any formal hearing. In response to a request for such a hearing, he said that the public business of the registration of vessels would be seriously impeded "if every potential competitor could call for a formal public hearing before each documentation or renewal of a document for each of the 44,000 commercial vessels under the American flag." (J.A. 59). The Commissioner was not persuaded by the

showing made by the protestants and announced his decision to document the two vessels. (J.A. 10-11).

Complaints and intervening complaints were then filed in the United States District Court for the District of Columbia by the several petitioners. (J.A. 2-12, 69-73, 78-84, 88-96). They named the Secretary of the Treasury, the Commissioner of Customs, the Bureau of Customs and Sea-Land as defendants. The petitioners claimed in various ways to be in competition with Sea-Land and urged that the documentation of the two Sea-Land vessels was illegal and to their prejudice.[2] The defendants moved to dismiss on the ground that the petitioners' status as competitors or potential competitors of Sea-Land did not give them standing to challenge the governmental action of which they complained. (J.A. 74, 84-86, 103-04). The complaints were dismissed. (J.A. 104-05). On appeal the dismissal was affirmed by the Court of Appeals for the District of Columbia Circuit in a unanimous opinion written by Judge Burger for a panel that also included Chief Judge Bazelon and Judge Fahy. The Court of Appeals' opinion carefully reviewed the rele-

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[2] Seatrain is a common carrier by water, holder of a certificate of public convenience and necessity issued by the Interstate Commerce Commission, operating between New York and Savannah and New Orleans and Texas City. American-Hawaiian holds a certificate of public convenience and necessity as a common carrier by water, has engaged in the intercoastal trade and plans to re-enter that trade if and when it gets some ships. American Union Transport, Inc., owns and operates two vessels that engage in the coastwise trade between New York and other Atlantic ports and San Juan, Puerto Rico. The petitioner railroads transport freight across the country by arrangements with one another.

vant decisions of this Court and of the Court of Appeals concerning standing to challenge governmental action claimed illegally to aid a competitor. It analyzed the terms and history of the statute, Section 27 of the Merchant Marine Act of 1920, as amended in 1960, upon which some of the petitioners relied as giving them standing. (The railroad petitioners do not claim to have standing but only a "sufficient interest to sustain their right to participate as intervenors . . . ." [Pet., pp. 4-5].) The court held that on the cases the petitioners' status as competitors, without more, did not give them standing and that they had pointed to no statute conferring standing upon them. "Congress did not intend to insulate coastwise carriers from other domestic competition or to give them any legally protected right to be free of such competition." (Pet., p. 7a).

REASONS FOR DENYING THE WRIT

The Court of Appeals did not, as petitioners allege, decide an important question of federal law that should be settled by this Court. Rather, the decision below is an application to particular facts of well-established principles of law that govern the availability of a judicial remedy to a person claiming to be injured by governmental action that enhances the ability of another person to compete with him in his business. Under the decisions of this Court there is no uncertainty about the proper guide to decision. Competitive status alone is not enough to confer standing. *Tennessee Elec. Power Co.* v. *TVA*, 306 U.S. 118 (1939); *Alabama Power Co.* v. *Ickes*, 302 U.S. 464 (1938), but Congress may direct that aggrieved competitors be allowed to go into court. *American Truck-*

ing Ass'ns v. *United States*, 364 U.S. 1 (1960); *Alton R.R.* v. *United States*, 315 U.S. 15 (1942); *FCC* v. *Sanders Bros. Radio Station*, 309 U.S. 470 (1940). The question always is whether a statute explicitly or by necessary implication from its language and purpose accords to a person the right to have judicial review of governmental action that assists a competitor. The court below, which, functioning at the seat of the government, has more frequent occasion to seek an answer to that question than any other appellate court in the federal system, answered it "no" on the particular facts of this case. Its decision embodying that answer is not, as petitioners allege, in conflict with decisions of this Court or with prior decisions of the court below (the latter kind of conflict is not, in any event, a ground for certiorari), and it is clearly correct.

1. Under the guise of urging that the Court of Appeals' decision was on an important question of federal law, the petitioners argue the merits of their standing claim. (Pet., pp. 11-16). In doing so they recognize that the question in each case is, as we have stated it, whether Congress meant that competitors should have a right to complain of governmental acts that intensify their competition.[3] That petitioners do

[3] Petitioners approach the question through Administrative Procedure Act § 10(a), 60 Stat. 243, 5 U.S.C. § 1009(a). (Pet., pp. 11-12). That section provides that "any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof." This basically restates the judge-made law of standing. Competition does not inflict a "legal wrong" upon the competitor who is hurt thereby, Alabama Power Co. v. Ickes, 302 U.S. 464, 480 (1938), and the nature of the inquiry into whether a person is "adversely affected or aggrieved . . . within the meaning of any relevant statute" is the same with and without § 10(a).

so recognize is shown by their marshalling and lengthy discussion of the same legislative materials that failed to persuade the court below to construe the statute as they urged. (Pet., pp. 13-16, espy. p. 14 n.25). The only question of federal law the petitioners assert, then, is whether the court below correctly decided this question under the terms of a particular statute. Their plea that this Court review the decision below because an important question of federal law is involved would better be stated forthrightly as a plea that they should have a third opportunity to convince a judicial tribunal that on principles whose force and validity are recognized on all sides they are right and the other side is wrong. This Court does not sit to hear cases of that kind.

2. Petitioners assert in general terms an inconsistency between the decision below and decisions of this Court, but they name no decision of this Court with which the decision below is inconsistent.[4] What they say is that "the strong trend of the law is that a licensee functioning in a field to which entry is restricted by licensing requirements has standing to test the legality of the issuing of a license to another to enter such field." (Pet, pp. 16-17). We deal below with the petitioners' use of the word license and variants as if such use provided a magic formula for standing. At this point we note that the only decisions claimed to represent the trend of which petitioners speak are decisions of the court below itself. Petitioners were so little impressed by the inconsistency they now profess to see

[4] They cite FCC v. Sanders Bros. Radio Station, 309 U.S. 470 (1940), in this discussion. That case is a classical instance of a decision that Congress had expressly conferred standing to complain of the enfranchising of new competition. *Id.* at 476-77.

that they did not ask the court below for a rehearing en banc, as they were privileged to do and as is the appropriate way of resolving intra-circuit conflicts. In fact there is no inconsistency.

The court below carefully distinguished its own recent decision in *Whitney Nat'l Bank* v. *Bank of New Orleans & Trust Co.*, 323 F.2d 290 (D.C. Cir. 1963), *cert. granted*, 376 U.S. 948 (1964), pending as Nos. 26 and 30 of this Term (Pet., pp. 17-18). It did so on the ground that in that case, where the court held that state banks had standing to sue to enjoin a federal official from certificating a national bank, the court found "that federal statutes had guaranteed that state banks would be free of certain competition from national banks." (Pet., p. 10a n.6). Petitioners say that this is not a real distinction because in this case too the relevant statute was designed to protect existing licensees. The point is, however, that the court below held to the contrary with respect to the statute invoked by petitioners, and petitioners thus are merely reasserting their principal argument.[5]

The petitioners also profess to see a conflict with *Atchison, T.&S.F. Ry.* v. *Summerfield*, 229 F.2d 777 (D.C. Cir. 1955), *cert. denied*, 351 U.S. 926 (1956). (Pet., pp. 18-19). The court below saw no such conflict (Pet., pp. 8a-10a), and there is none. There certain railroads challenged the Post Office Department's

[5] The Government has renewed in this Court its contention that the complainants in the *Whitney Bank* case do not have standing. (Br. for Pet'r Saxon, Nos. 26 and 30, O.T. 1964, pp. 36-40). If the Government's position on the point were sustained by this Court, it would mean only that the Court of Appeals had misread the statutes involved in the *Whitney Bank* case. It would have no implication for this case.

first-class-mail-by-air program. They were held to have standing to do so because they had made substantial investments in mail-carrying equipment in fulfillment of a statutory duty to carry the mail, and their investment, made at the Government's command, would be rendered less valuable by governmental action. The impact upon them was immediate and direct, and it was in an area where the Government itself had directed the prior action for which they were now to be made to suffer. There is nothing of the sort in this case. No governmental action has compelled the petitioners to engage in the coastwise trade or to acquire equipment in order to do so. Indeed, the emptiness of the petitioners' assertions is pointed up by the situation of the petitioner American-Hawaiian, which does not even have any seagoing equipment.[6]

In truth, this case and the cases cited by petitioners are only several among many in which the court below has dealt with the problem of competitors' standing. It was the decision of the court below denying standing to privately-owned utilities to complain against governmental loans to competing municipal utilities that was affirmed by this Court in what is perhaps the leading case on the point, *Alabama Power Co.* v. *Ickes*, 302 U.S. 464 (1938), *affirming* 91 F.2d 303 (D.C. Cir. 1937). For other cases in which competitors were held to lack standing because no statute conferred it, see *Texas State AFL-CIO* v. *Kennedy*, 330 F.2d 217 (D.C. Cir. 1964), *cert. denied*, Oct. 12, 1964, No. 182, O.T. 1964; *Union Nat'l Bank* v. *Home Loan Bank Bd.*, 233 F.2d 695 (D.C. Cir. 1956); *Kansas City Power & Light Co.* v.

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[6] The railroad petitioners can make no claim under the cited case and indeed do not claim to have standing on any ground. (Pet., pp. 4-5).

McKay, 225 F.2d 924 (D.C. Cir. 1955), *cert. denied*, 350 U.S. 884 (1955); *United Milk Producers* v. *Benson*, 225 F.2d 527 (D.C. Cir. 1955). And for other cases in which the court found that Congress had conferred standing on competitors, see *National Airlines, Inc.* v. *CAB*, 306 F.2d 753, 757-58 (D.C. Cir. 1962); *National Coal Ass'n* v. *FPC*, 191 F.2d 462 (D.C. Cir. 1951). Even if inconsistency of decision within a circuit were a ground for certiorari, which it is not, there is no inconsistency in these decisions, all of which proceed upon the principle we have stated.

3. The petitioners' statement of reasons for granting the writ, as we have indicated, goes principally to the merits of the question of their standing. Taken as a brief on the merits, it is unsuccessful. In their argument the petitioners use over and again words such as licensees, licenses and licensing. Only so are they able to give any plausibility to their case. But the existence of a license is by no means a guarantee of standing to challenge governmental action that purportedly aids a competitor. See *Tennessee Elec. Power Co.* v. *TVA*, 306 U.S. 118, 136-39 (1939).

In any event, the licenses to which the petitioners refer, the documents evidencing enrollment of vessels—documents that must pertain to a vessel regardless whether its owner is engaged in common carriage—are not, as petitioners seek to suggest, like certificates of public convenience and necessity authorizing common carriers to provide service. The Interstate Commerce Commission, not the Commissioner of Customs, issues these to common carriers by water in the coastwise

trade.[7] Licensees in the regulated industries typically have substantial rights against one another when it comes to the franchising of new or additional competition. These petitioners would have such rights as against Sea-Land were the question of its basic authority to engage in the coastwise trade in issue.

The decision of the Court of Appeals, in which it plainly was correct, was simply that in the statute upon which petitioners rely Congress was not concerned with competition among carriers. Section 27 of the Merchant Marine Act of 1920, and particularly the 1960 amendment in issue here, is a "Buy American" statute. Congress meant by it "to stimulate and encourage resort to domestic shipyards and thus ensure them sufficient business so that their facilities would be adequate in time of national emergency." (Pet., p. 7a).

The 1960 amendment to Section 27, with its savings clause, was enacted after a ruling of the Bureau of Customs construing an amendment enacted in 1956, which for the first time required that, if rebuilt, ships be rebuilt in the United States to retain their coastwise privileges. The Bureau ruled that the amendment did not prohibit the use of foreign-built midbodies to enlarge vessels so long as they were installed in this country. The House committee explained the reason for the 1960 amendment, including the savings clause:

> "Shipbuilding officials in this country view with alarm the Customs ruling permitting the use, with-

[7] Water Carrier Act, 54 Stat. 929, as amended, 49 U.S.C. §§ 901-23. The trade between the continental United States and Puerto Rico is regulated by the Federal Maritime Commission under the Shipping Act of 1916, 39 Stat. 728, as amended, 46 U.S.C. §§ 801-42, because the Water Carrier Act does not cover United States-Puerto Rico transportation. See 49 U.S.C. § 902(i).

out loss of coastwise privileges, of foreign mid-sections in the rebuilding of domestic vessels. It was contrary to the spirit of the statute involved, they argued, and could open the way to other even more damaging possibilities . . ..

* * *

"Your committee is of the opinion that this legislation is needed to close the above-mentioned loophole in the existing statute and to buttress our traditional national objectives affecting the coastwise trade and the shipbuilding industry. Relying upon the latest Bureau of Customs ruling, a number of shipowners and builders have in good faith entered into contracts requiring foreign-built major components, the completion of which in some cases, will take up to nearly 24 months. Accordingly, your committee feels that the time period in section 4 is fair and reasonable to all." H.R. Rep. No. 1887, 86th Cong., 2d Sess. 3 (1960); see also S. Rep. No. 1279, 86th Cong., 2d Sess. 3 (1960).

The committee, moreover, set out the comments of the Department of Commerce, which said that one of the major objectives of the shipping statutes, which the amendment would assist in fulfilling was

"to foster and maintain the shipbuilding industry in the United States by placing work in the domestic shipyards so that the yards will be sustained for mobilization and national defense purposes. At the present time, shipyards in this country need work very badly and there are recent examples of instances where, had this proposed legislation been the law, additional work might have been generated for American shipyards." H.R. Rep. No. 1887, *supra* at 7; S. Rep. No. 1279, *supra* at 6.

Nothing petitioners cite indicates any different purpose. The Court of Appeals, which, contrary to peti-

tioners' assertion that it "looked to a fragment of the basic statute" (Pet., p. 13), carefully traced the statutory history beginning in 1920, was unable to find any contrary indication, and its decision was clearly correct.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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